

SERVED: November 22, 1993

NTSB Order No. EA-4022

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 4th day of November, 1993

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Dockets SE-11842
v.	)	SE-11843
	)	
PAUL VILLERY, III and	)	
LOWELL J. JOHNSON,	)	
	)	
Respondents.	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on December 19, 1991, following an evidentiary hearing.<sup>1</sup> The law judge dismissed orders of the Administrator: 1) charging respondent Villery with violating 14 C.F.R. 91.9 and suspending his airline transport pilot (ATP) certificate for 30 days; and

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached.

charging respondent Johnson with violating 14 C.F.R. 91.75(a) and suspending his ATP certificate for 15 days.<sup>2</sup> We affirm the law judge's dismissal of the complaints and, therefore, deny the Administrator's appeal.

Respondents Villery and Johnson were first officer and non-flying pilot in command, respectively, of Continental Airlines' July 24, 1989 Flight 528 between Burbank, CA and Denver, CO. According to the Administrator, respondents were cleared to flight level 280 (28,000 feet), but descended below that, causing loss of vertical separation with another Continental flight, #1296, traveling at flight level 270. The Administrator introduced NTAP<sup>3</sup> radar data, and the involved controller testified to the equivalence of those data to what he saw at the time on his radar screen.<sup>4</sup>

Respondents, in turn, flatly denied deviating from the 28,000-foot clearance, and suggested that the radar data in this

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<sup>2</sup>§ 91.75(a) (now 91.123(a)) provided, as pertinent:

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. . . .

§ 91.9 (now 91.13) provided, as pertinent:

(a) No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>National Tracking Analysis Program.

<sup>4</sup>Among others, the Administrator also proffered a witness who testified to the mechanics of the NTAP data (e.g., how it is collected, how the data is read and plotted to determine location).

case were, for whatever reason, inaccurate. Respondents attempted to demonstrate other inaccuracies in the radar data, such as data showing flight #1296 descending 1300 feet in 30 seconds, at a time when the controller testified that flight #1296 was in level flight at 27,000 feet. Compare Tr. at 75-76 with Tr. at 37.

The Administrator, on appeal, argues that the law judge considered no evidence supporting the Administrator's case other than the NTAP report. The Administrator cites the law judge's discussion of this report, which culminated in his statement (Tr. at 163-164) that, "if . . . all the Administrator has to do is come in and show an NTAP and say here it is, I wouldn't have a job, at least in these cases. Respondents wouldn't need to show up." From the Administrator's standpoint, the law judge seemed to ignore the value of the testimony of the controller, who gave accounts of the events that were corroborated by the NTAP report, and seemed to ignore testimony that the radar had been tested to specification on the day in question. To ignore such testimony would be reversible error.<sup>5</sup>

We think the Administrator has misheard (or misread) the law judge's decision. We recognize that the practice of issuing bench decisions may compress to some degree the reasoning and explication that constitute our law judges' initial decision-

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<sup>5</sup> Under the Administrative Procedure Act, 5 U.S.C. 557, an initial decision of a hearing officer must include findings and conclusions, and the reasons or bases therefore, on all material issues of fact, law, or discretion presented on the record.

making. Still, it is apparent here that the law judge's comments directed to the possibility of error in the NTAP exhibits would also have affected his perception of the testimony offered by the on-duty air traffic controller, as the information available to that controller would not have been materially different from that later produced by exhibit. If the NTAP exhibit was marred by a malfunction, as the judge obviously believed it to be, then too the controller's screen depicted faulty information. While the Administrator is correct in noting that the Board believes that NTAP reports are largely reliable evidence of an aircraft's position, that does not mean that this evidence will warrant affirmance of the Administrator in every case, regardless of the quality of proof and the particular evidence put on the record. Whether this decision stands or falls is dependent on the quality of all the evidence, not simply the NTAP display. We think that is all that was intended by the law judge's declaration against taking the NTAP evidence as an automatic determinant.

Here, the law judge was required to analyze the Administrator's documentary radar and ATC transcript evidence, and the related testimony by the controller. He also had the opportunity to observe respondents' flat denials and their explanation of the events, and to consider the absence of an altitude query by ATC when the deviation was alleged to have occurred, or indeed any contemporaneous notice to the pilot of the deviation.<sup>6</sup> The record also contained discussion of the

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<sup>6</sup>As the Administrator acknowledges (Appeal at footnote 2),

general possibility of equipment malfunctions and the possibility of an error in this specific instance.<sup>7</sup> While, as noted, the practice of issuing oral bench decisions may result sometimes in a too short rendering of a law judge's line of logic, this evidence had all just been heard at the time of decision, and we have no reason to believe the law judge has not accorded it careful attention.

On the basis of the record before us, we do not find demonstrable error in the law judge's conclusion that the Administrator failed to meet his burden of proof. The law judge accorded great weight to the testimony of the respondent crew and such credibility determinations are peculiarly within the judge's domain. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). The judge apparently believed that the technical evidence was marred and that the

(..continued)

it is FAA policy for ATC to notify pilots of altitude deviations, "workload permitting." ATC did not advise respondents that they were deviating from their assigned altitude, nor did ATC query them as to their altitude. Either of these common techniques would have provided a contemporaneous response from the crew that could have substantially illuminated the present debate.

<sup>7</sup>The close proximity of thunderstorms during the critical flight segments was suggested as one possible source of error. Respondents also elicited testimony to show that, although not common, there were occasions when ATC's radar data would show altitudes different from information available to the pilot in the aircraft. Although the Administrator's witnesses uniformly testified to their belief that any error here would have exhibited itself in various ways, and did not, they declined to testify that this equipment was perfect. See, e.g., Tr. at 73 (there can be electrical interference).

possibility of an ATC equipment malfunction (perhaps related to the thunderstorm activity) was too high to warrant a conclusion, in the face of the rest of the record, that the preponderance of evidence supported the Administrator. There is insufficient basis to reverse this determination.<sup>8</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

The Administrator's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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<sup>8</sup>The Administrator also argues that the law judge erred as a matter of law in other findings he made with regard to respondents' duties. (The law judge held that respondent Johnson did not violate § 91.75(a) because, even though he was the pilot in command, he was performing other functions and not listening to ATC at the time. As to respondent Villery, the law judge found he was not careless, in part because it was Villery who alerted ATC to the possible separation problem with flight #1296.)

These findings by the law judge are irrelevant to the case as it was argued, as respondents' defense was that they did not deviate, not that they did, but for a good reason. Having found that the Administrator did not prove the factual underpinning of the complaints -- the altitude deviation -- we have not reviewed these other aspects of the law judge's decision and we need not address these claims of error in the initial decision.